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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980
No. _____

JEANNE BRANDON, et al.,
Petitioners,

-vs-

THE BOARD OF EDUCATION OF GUILDERLAND SCHOOL DISTRICT, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, pursuant to the First Amendment's prohibition against establishment of religion, a school district must ban all student groups organized to engage in voluntary religious speech and prayer, even though the group proposed to meet on public high school property during a period of the day when school is not in session.

2. Whether, pursuant to the constitutional guarantees of freedom of speech, freedom of religion, freedom of association, and equal protection, a school district must allow student groups to voluntarily meet on public school property during off-school hours for the purpose of engaging in religious speech when access is given to other student groups.

PARTIES

Petitioners are Jeanne Brandon, Erin Marie Conway, Jill George, Lisa A. Macaione, Lauren M. Rogers, and William Smith, on their own behalf, and on behalf of all those similarly situated. The respondents in this case are the Board of Education of the Guilderland Central School District, Guilderland, New York; Peter E. Knauss, Grace Serviss, William P. Chamberlin, Joseph L. Cohen, Beverly Le Blanc, Gordon S. Purrington, Patricia Renshaw, Alan L. Ross, and Richard M. Smith, all individual members of the Board of Education of Guilderland Central School District during the period relevant to the instant action; and Peter W. Alland and Charles Ciaccio, Superintendent of Schools in Guilderland, and principal of Guilderland High School, respectively. [Hereinafter collectively designated as the "Board of Education"]

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OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the United States District Court for the Northern District of New York, rendered on April 16, 1980, has been reported. *Brandon v. Board of Education of Guilderland, 487 F.Supp. 1219 (N.D.N.Y. 1980)*

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 17, 1980. This petition for certiorari was filed within ninety (90) days of that date. No petition for rehearing was filed with the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

At the time this action for declaratory and injunctive relief, damages and other costs was instituted, Respondents' uniformly permitted students, teachers and members of the public to conduct meetings on school property without prior censorship. Petitioners [hereinafter the "Students for Voluntary Prayer" or "the Students"], acting pursuant to the requirements of a resolution of the respondent Board of Education which allowed students to meet "at authorized times and places on a voluntary basis, with like-minded fellow students, for spiritual or religious conversations or activities ...without participation or involvement of school staff," sought permission to meet on school property for religious conversation and prayer during times of the day when school was not in session.

The Board refused, and the students commenced this action. Jurisdiction in the District Court was based upon the First and Fourteenth Amendments to the United States Constitution, 28 U.S.C.§§ 1343(3), 2201-2, and 42 U.S.C.§ 1983.

The record before the District Court was, in all respects material to this Petition, undisputed. The petitioners believe they have an obligation each day to engage in prayer and that God has directed them to join together and pray as a group. (R. Joint App. pp. 10-11, 24)[1] In keeping with that belief, they formed the "Students for Voluntary Prayer" and planned to meet on the school grounds in the mornings before the beginning of home

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[1] All citations to the record below are to the Joint Appendix filed by counsel for the students and the Board of Education with the Court of Appeals for the Second Circuit.

room and class instruction or after school.

Their activities were to be completely voluntary and were open to participation by any interested student. Their independence from all official school functions was emphasized by the fact that they did not seek official recognition of their activity or seek assistance, supervision supervision, or participation of the faculty or staff. (R. Joint App. at pp. 8,10,35,36,37,40) They offered to provide volunteer adults if the Board of Education deemed supervision necessary. (R. Joint App. at p. 8)

Respondent Ciaccio denied the request for an authorized meeting place in writing on September 23, 1978. (R. Joint App. at p. 8). This denial was made an official action of the Board of Education on

December 19, 1978. The effect of the denial was to prohibit petitioners from meeting.

At official Board meetings held on February 22, 1979 and March 6, 1979, students Rogers and Smith renewed their request to be permitted to meet in a classroom during non-school hours (R. Joint App. at pp. 9, 22, 36), but those requests were denied by Board resolution on March 6, 1979, (R. Joint App. at p. 38), notwithstanding the fact that the Board of Education allowed students, teachers, and members of the public to conduct meetings on school property during non-instructional hours. (R. Joint App. at pp. 10, 15-18) This lawsuit was filed shortly thereafter alleging that the Board's refusal constituted a violation of their First Amendment rights to free exercise of religion, freedom of speech

and association, and the right to equal protection under the law. No material facts were disputed, and the students moved for summary judgment shortly after the Board answered. Oral argument on the motion was heard by Judge Neal P. McCurn on December 20, 1979.

On April 16, 1980 Judge McCurn dismissed the various procedural defenses raised by the Board and decided the merits of the constitutional issues against petitioners. He held that the Board could not permit students to meet on public school property for religious speech without impermissibly advancing religion under the Establishment Clause and entangling church and state. He dismissed the students' speech and equal protection claims and entered judgment for the Board. *Brandon v. Board of Education of Guilderland, 487 F.Supp. 1219 (N.D.N.Y.*

1980) A timely appeal for that decision was filed with the Court of Appeals for the Second Circuit, which affirmed the lower court's decision by opinion on November 17, 1980. (Appendix) This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THE RULINGS BELOW CONFLICT WITH IMPORTANT ESTABLISHMENT CLAUSE PRINCIPLES ARTICULATED BY THIS COURT AND OTHER LOWER COURTS.

Since the landmark decisions in *Zorach* v. *Clauson, 343 U.S. 306 (1952)*[2] *and McCollum* v. *Board of Education, 333 U.S. 203 (1948)*,[3] many public

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2 Upholding a public school program which allowed students to be released during class hours to obtain religious instruction elsewhere. *See Part I (A) infra.*

3 Striking down a relese time program where religious instruction was offered by teachers on the school property during regular class hours. *See Part I(A) infra.*

school districts throught the country have taken positions which summarily ban religious speech and activity by students on schcol property without regard to the degree to which the state or its employees are involved. *Compare, e.g., Dittman v. Western Washington University, No. C79-1189V (W.D. Wash. Feb. 27, 1980), appeal docketed, No. 80-3120 (9th Cir., April 7, 1980); Trietley v. Board of Education, 409 N.Y.S. 2d 912 (1978); Opinion of the Tennessee Attorney General #201 (Nov. 1, 1980) with, e.g., Chess v. Widmar, --F.2d-- (8th Cir. 1980), rev'g, 480 F.Supp. 907 (W.D. Mo. 1979), petition for cert. filed, 49 U.S.L.W. 3353 (November 11, 1980) (No. 80-689); Keegan v. University of Delaware, 349 A.2d 14 (Del. 1975), cert. den., 424 U.S. 9334 (1976).* The decisions of the courts below and the respondent Board of Education which pro-

hibit students from meeting voluntarily in Guilderland High School to discuss religious issues and to pray, either immediately before commencement of home room and classes, or immediately after the close of the school session are examples of such summary prior restraints.

However, the decisions are not uniform. In contrast, to the decisions below, several courts have upheld the constitutionality of programs identical to the one proposed by the students in this case. *Reed* v. *Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965); Johnson* v. *Huntington Beach Union High School Dist., 68 Cal.3d 1, 137 Rptr. 43 (1977); Resnick* v. *East Brunswick Township Bd. of Education, 77 N.J. 88, 389 A.2d 944 (1978).* Finally, others have sought to draw distinctions based upon the age of the students involved. *See, Chess* v. *Widmar, supra.*

The Court should grant certiorari to resolve the important constitutional questions raised by the decision of the Court of Appeals below. In practice, it authorizes continuing prior restraints on religious speech and association. In theory, it ignores the fundamental right of millions of students to be free of governmental control of their associations and the free flow of ideas. Review by this Court is necessary to clarify the state of the law regarding extracurricular religious activities by public school students which do not involve participation by the state or its agents.

A. The Ruling Below Conflicts with Settled Establishment Clause and Principles Governing Neutrality, School Prayer and Religious Release Time Programs Decided by this Court.

The First Amendment to the United States Constitution declares that "Con-

gress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." This Establishment Clause proscription is made applicable to the states, and, ultimately, to boards of education for public school districts, by operation of the Fourteenth Amendment. *Everson* v. *Board of Education, 330 U.S. 1, 15 (1947)* Although *Everson* held that the Establishment Clause creates a "wall between church and state," 330 U.S. at 18, this Court has subsequently interpreted the clause in a manner which would allow programs such as the one proposed by the petitioners.

This Court has consistently held that the Establishment Clause does not create a hermetically sealed, impermeable wall between government and religion:

> [A] system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required. *Roemer* v. *Board of Public Works*, *426 U.S. 736, 745-46 (1976)* (emphasis added).

In defining the permissible zone of church and state interaction, the doctrine of "accommodating neutrality" was articulately stated by the late Justice Douglas in *Zorach* v. *Clausen*, *343 U.S. 306 (1952)* and reaffirmed by Chief Justice Burger in *Walz* v. *Tax Commission*, *397 U.S. 664, 669 (1970)*.

> When the state encourages religious instruction or cooperates with religious authorities by adjusting

> the schedule of public events to sectarian needs, it folows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs. *Zorach v. Clausen, supra, 343 U.S. at313-14.* (emphasis supplied)

It is precisely such accommodating neutrality which the students seek in this case. They merely ask to be accorded the same right as other groups to meet on school property before the bell for the first class in the morning (home room) or after the close of the school day when instruction and classes are over. (R. Joint App. at pp. 8, 10, 35, 36, 37, 40).

In *McDaniel v. Paty, 435 U.S. 618, 641 (1978)* Justice Brennan concurring stated that the "Establishment Clause properly understood, is a shield against any attempt by government to inhibit re-

ligion as it has done here; ...It may not be used as a sword to justify repression of religion or its adherents from any aspect aspect of public life." (footnote omitted). The Court of Appeals ignored that statement and held that "[w]hile students have First Amendment rights to political speech in public schools, [citation omitted], sensitive Establishment Clause considerations limit their right to air religious doctrines." (Ap. at A-18).

In spite of the principles already summarized and the holdings of *McDaniel* and *Roemer* that "[r]eligious institutions [and individuals] need not be quarantined from public benefits that are neutrally available to all," 426 U.S. at 746, the courts below determined that voluntary student meetings would run

afoul of the three-pronged test for "establishment" developed in *Lemon* v. *Kurtzman*, *403 U.S. 602 (1971)*.

Professor Laurence Tribe described such an accommodating neutrality in a public educational context in his recent treatise on constitutional law. He noted that school buildings are similar to other public forums when they are not being used for instructional purposes. In essence, they are "surplus land":

> Thus, if the state allowed all charitable groups to use school buildings free of charge during such periods (and others to use the buildings for a fee) to exclude religion [would not be an establishment of religion and] might violate free exercise. *Tribe, American Constitutional Law at 825 n.12* (1978).

Similarly, this Court has approved the use of public places as a forum for religious activities. *See Saia* v. *New*

York, 334 U.S. 558 (1948); Niemotko v. *Maryland, 340 U.S. 268 (1951). See generally, Part II infra.*

A brief examination of school prayer cases previously before this Court illustrates these principles. In *Engel* v. *Vitale, 370 U.S. 421 (1962)* this Court struck down school board regulations which affirmatively *required* daily morning ceremonies in the classrooms consisting of the repetition of a non-denominational prayer which was composed by the state. In *Abington School District* v. *Schempp, 374 U.S. 203 (1963)* this Court struck down *required* daily Bible reading in the classroom followed by student recitation of the Lord's Prayer. In *Stone* v. *Graham, 49 U.S.L.W. 3369 (Nov. 18, 1980) (per curiam)*, this Court struck down a Kentucky law which *required* the posting of the Ten Command-

ments in public elementary and secondary school classrooms.

The relevant factors in each of these cases were that the religious activities were *initiated or required by the state, they occurred during the regular school session, and were part of a school-wide,* official program. The state educational system fostered a specific ideological approach to religion and utilized the mandatory school attendance laws to further the religious tenets it had chosen to sponsor during school hours. These cases, however, stand in sharp contrast to the extra-curricular, student-initated, student-controlled, voluntary meetings proposed by the students in the case at bar. The students never sought official recognition for their group. Nor may it be seriously con-

tended that the School Board sponsors or supports each and every position taken by students or citizens who meet on school premises during non-class hours.

The Appeals Court's rigid view of the concept of "sponsorship" flies in the face of both *Zorach v. Clauson, 343 U.S. 306 (1952), and McCollum v. Board of Education 333 U.S. 203 (1948)* by totally ignoring the essential differences between active involvement and passive accommodation or tolerance. In *Zorach*, this Court upheld a public school release-time program which enabled public school children to obtain religious instruction during the course of the school day and rejected arguments that passive accommodation was an impermissible aid to religion. However, in *McCollum* a release-time program similar to that in *Zorach* but where the instruction took place on school premi-

ses, *during school hours*, was held invalid because "the classrooms were used for religious instruction *and the force of the public school was used to promote that instruction*". 343 U.S. at 315 (emphasis added). Notably, the record at bar discloses no evidence whatsoever of enforced participation or of a "captive audience", but the courts below were more than willing to assume that it did.

Because off-campus religious instruction was allowed in *Zorach* during the school day, but on-campus instruction was not, many school boards have adopted the simplistic and mechanistic notion that the only operative fact under the Establishment Clause is the location of the religious activity. Such an approach, however, misses the point so painstakingly made in the cases: a "classroom" is a curriculum teaching unit controlled and

supervised by the state, not merely a geographic location. *See*, Toms and Whitehead, *The Religious Student in Public Education: Resolving a Constitutional Dilemma*, 27 Emory L.J. 3, 17 (1978) (hereinafter cited as *Religious Student*). L. Tribe, *American Constitutional Law at 825 n. 12 (1978)*

A careful analysis of the cases indicates that the necessary separation of church and state can be achieved by separating the religious activity *in time* and *sponsorship* from day-to-day instruction, as well as by moving the activity to a different location. But the courts below read them to forbid *any* contact with religion during school hours even though [t]he degree of official support of religious activities is greater, ...in the school prayer or religious instruction cases than in the instant case."

Reasoning that mere accomodating is "symbolic" support which would "advance" religion, it affirmed the first content-based prior restraint in a non-pornography or national security case.

B. The Ruling Below Conflicts with the Decisions of Other Federal and State Courts and a Determination by This Court is Necessary to Insure Uniformity On this Important Constitutional Issue.

Although there are no Supreme Court cases directly on point, several lower courts have decided the precise issue before this Court. In a case strikingly similar to the instant one, *Reed v. Van Hoven, 237 F.Supp. 48 (W.D. Mich 1965)*, a federal court ruled that public school students who wished to say a prayer or read scriptures in the morning before the school day begins and after the school day ends should be permitted to do so.

> The touchstone in both *Engel* and (sic) *Vitale*, *supra*, and *Abington School District* v. *Schempp*, *supra*, was the support given to the practices by the local school authorities. In both cases, the exercises were directed to be held at the opening of the school day. Students who chose not to participate were required to absent themselves at the start of the school period or remain and silently endure a ceremony which violated their constitutional rights. 237 F.Supp. at 53.

Under the plan held constitutional in *Reed*, students wishing to pray or read scriptures would meet in a separate room either before or after the school day and would complete their exercise at least five minutes before the beginning of the regular school day, or begin their activity no sooner than five minutes after the completion of the regular school day. There was to be no special bell signifying the beginning or end of this period and after the completion of the period

there was to be a general commingling of the entire student body on the way to class. The role of teachers was strictly limited to maintaining order and discipline. The program proposed by the students herein would conform precisely with these strictures.

In an analagous situation, a suit was brought in New Jersey state court to prohibit religious groups from renting public school facilities during non-school hours. The East Brunswick, New Jersey Board of Education had a policy of renting the facilities to both non-secular and secular nonprofit groups, and the New Jersey Supreme Court found no violations of the Establishment Clause. *Resnick v. East Brunswick Town Board of Education, 77 N.J. 88, 389 A.2d 944 (1978).*

A similar rule is followed in California. Although a California Court of Appeals held, over a strong dissent, that official *recognition* of a High School Bible Study Club and permission to meet on campus *during the school day* violated the Establishment Clause, *Johnson* v. *Huntington Beach Union High School District, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977).* The parties in *Huntington Beach* stipulated that permission would be denied *only* if the meeting:

> was proposed to be held at any time during the school day (i.e., at any time between the time that students are first required to report their attendance in the morning until the last class is dismissed in the afternoon). Stipulation 21, 137 Cal. Reptr. at 53.

Thus, even the *Huntington* majority would have permitted the proposed before-school religious activity denied in the

instant case by the Guilderland Board. *See, 137 Cal. Reptr. at 46, n. 4.* Indeed, the State Civic Center Act required that schools be open to all charitable groups during off-school hours. 137 Cal. Reptr. at 53 n.2. The dissent in *Huntington* would have allowed the recognition of the Bible Club and permitted it to meet during the school day.

In *Keegan v. University of Delaware, 349 A.2d 14 (Del.1975), cert. denied 424 U.S. 934 (1976)*, the Delaware Supreme Court reviewed a university regulation which prohibited student use of space in campus buildings for worship services. The University allowed business meetings and special programs in the same area. The Court held that the Establishment Clause did not require the University to prohibit religious worship in campus dor-

mitories, such a policy would be neutral and could not have the primary effect of advancing education by allowing students to meet together to exchange ideas and share mutual interests. In that sense, there would be no primary advancement of religion. 349 A.2d at 16. *Accord Chess v. Widmar, --F.2d-- (8th Cir. 1980), petition for cert. filed, 49 U.S.L.W. 3353 (Nov. 11, 1980) (No. 80-689), rev'g. 480 F.Supp. 907 (W.D. Mo. 1979). See also Stacy v. Williams, 306 F.Supp. 963, 975 & n.28 (N.D. Miss. 1969)* (three judge court) (University of Mississippi regulation banning religious meetings or gatherings on campus unconstitutional); *Wood v. Mt. Lebanon Township School, 342 F.Supp. 1293 (W.D. Pa. 1972)* (Invocation and benediction by clergyman at voluntary high school graduation ceremony does not violate Establishment Clause).

Notwithstanding these decisions, the courts below followed an intermediate New York decision, *Trietley v. Board of Education*, *409 N.Y.S. 2d 912 (1978)*, and held that allowing the students' to meet violated the Establishment Clause.[4] Supreme Court resolution of the conflict is necessary to insure that public high school students throughout the United States are treated equally regarding this important constitutional issue.

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4 Other cases cited by the Board of Education are inapposite. *Stein* v. *Oshinsky*, *348 F.2d 999 (2nd Cir. 1965)* held that kindergarten students were incapable of free exercise of religion without teacher assistance. *Mangold* v. *Gallatin*, *438 F.2d 1194 (3rd Cir. 1971)*, *Commissioner* v. *Leyden*, *358 Mass. 776, 267 N.E. 2d 226 (1971)*, *and Kent* v. *Commissioner* ___ *Mass.* ___ *(1980) (Case No. 2087)* all involved active school sponsorship of prayer by students in the classroom after commencement of the school day.

C. The Appellate Court Misapplied the Tripartite Test of *Lemon* v. *Kurtzman* by Banning Student-Initiated Religious Speech and Association

In *Lemon* v. *Kurtzman*, *403 U.S. 602 (1971)*, this Court held that a governmental action is constitutional under the Establishment Clause if the action has "a secular legislative purpose;... its principal or primary effect must be one that neither advanes nor inhibits religion; [and], the statute [or action does] not foster an excessive government entanglement with religion." 403 U.S. at 612-613. *See also Committee for Public Education and Religious Liberty* v. *Regan*, *444 U.S. 646, 653 (1980)*.

1. *The Relief Requested was Secular in Nature and Religiously Neutral in both Purpose and Effect.*

Although the court below correctly noted that "[a] neutral policy granting

all student groups, including religious organizations, access to school facilities reflects a secular, and clearly permissible purpose, the encouragement of extracurricular activities," (App. at A-13) it found that the second and third prongs of the test would be violated by permitting students to communicate religious ideas to interested fellow students. In the appellate court's view, the "prayer meetings would create not only an improper appearance of official support ... impermissibly advancing religion...", but also create unconstitutional entanglement between church and state. (App. at A-16) Notably absent from the Court's analysis, however, was either a review of the undisputed evidence that the state was *not* to be involved or an express finding of a factual justification for its ruling sufficient to overcome the

"heavy presumption" against the Constitutional validity of any prior restraint or expression. *Organization for a Better Austin v. Keefe, 402 U.S. 415, 419* (1971)

In *Roemer v. Board of Public Works, 426 U.S. 738 (1976)* this Court upheld categorical grant programs to religiously affiliated schools, stating that:

> *Everson* and *Allen* put to rest any argument that the State may never act in such a way that has the *incidental effect of facilitating religious activity."* 426 U.S. at 747 (emphasis added).

The "aid" cited by the District Court in its opinion --free use of building, lights, and heat -- is clearly incidental within the meaning of other decisions of this Court which have upheld the right of those who exercise their rights to communicate religious messages to share in

public benefit made equally available to all. *See, Everson v. Board of Education, 330 U.S. 1 (1947)*, (school busing); *Board of Education v. Allen, 392 U.S. 236 (1968)* (textbooks).

As frankly admitted by the Court of Appeals, the passive allowance of voluntary student meetings on school grounds during non-school hours simply does not rise to the level of "outward appearances of official state sanction" that would exist where government provides tangible support to religious activity. (App. at A-15). *See, e.g., Engel v. Vitale, supra.*

If meetings of religiously-oriented students compelled to be present on school property can be banned because of the "no-aid" principle, the mere use of public property, lighting or heat would

be sufficient to validate prior restraints on religious speech as preventing "symbolic" aid. *But see, Saia* v. *New York, 334 U.S. 558 (1948); Niemotko* v. *Maryland, 340 U.S. 268 (1951) and Martin* v. *City of Struthers, 319 U.S. 141 (1943); ISKCON* v. *Wolke, 453 F.Supp. 819 (E.D. Wis. 1978); United States* v. *Boesewetter, 463 F.Supp. 370 (D.D.C. 1978).* It is inconceivable that the Constitution sanctions such an approach.

2. *The Relief Requested Would Not Have Resulted in Impermissible Administrative or Doctrinal Entanglement.*

The only factual circumstances in which this Court has struck down government action pursuant to the entanglement test involved statutes which earmarked large sums of tax funds for private and church-related schools to ensure that the funds were not utilized in the religious

activities of the school. In each case continuing *government administrative surveillance* of the inner workings of religious institutions was deemed necessary. *See Roemer v. Board of Public Works, 426 U.S. (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).* That test has no applicability to a religiously-oriented student meeting on school property during non-school hours.

Even if the Students for Voluntary Prayer *had* official recognition by the School Board in the instant case, this Court's cases would not support the decision below. *See, Healy v. James, 408 U.S. 169 (1972).* The filing of periodic reports respecting a club's activities does not cause unconstitutional entangle-

ment. *See, Roemer v. Board of Public Works, 426 U.S. 736, 763-764 (1976); Holt v. Thompson, 66 Wis. 2d 678, 225 N.W. 2d 678 (1975)* (release-time program reports) In the instant case, the respondent Board of Education need only have involved itself in petitioners' activity to the degree necessary to avoid disruption. No financial aid was sought. No monitoring of the program was needed other than that which is normally exercised when other student groups utilize school property during off-school hours. These petitioners made every effort to avoid the Board's legal objections, including an offer to provide volunteer adult monitors acceptable to the Board. A review of the decision below, however, clearly discloses that it was the content of the intended speech -- not entanglement-- which resulted in the rejection of petitioners' claims.

II. THE DECISION BELOW SUBORDINATES SETTLED PRINCIPLES OF FREEDOM OF SPEECH, FREEDOM OF ASSOCIATION, FREEDOM OF RELIGION, AND EQUAL PROTECTION TO AN OVERBROAD AND CLEARLY ERRONEOUS CONSTRUCTION OF THE ESTABLISHMENT CLAUSE

A. Free Speech and Equal Protection

It is now settled that students do not automatically relinquish their constitutional rights at the public schoolhouse door. *See, e.g., West Virginia State Board of Education* v. *Barnette, 319 U.S. 624, 630-641 (1943)* (freedom of religion); *Tinker* v. *Des Moines Independant Community School District, 393 U.S. 503, 506 (1969)* (freedom of speech); *Healy* v. *James, 408 U.S. 169, 181 (1972)* (freedom of association).

In the case at bar, the Court of Appeals for the Second Circuit has held that the Board of Education must refuse

to allow students to meet on the school premises during non-school hours because the *content* of students' intended speech is not suitable in the public school environment. Such action unquestionably constitutes a prior restraint which prevents privately-initiated speech from making its way into the marketplace of ideas on the basis of content. This Court has consistently warned that "any system of prior restraints, comes to this court bearing a heavy presumption against its validity." *Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1968); New York Times Co. v. United States, 403 U.S. 714, 715 (1971) (per curiam); Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976). See generally* Tribe, *supra* at 724-731. Regulating speech on the basis of content is justifiable only when it creates a "clear and present danger" of

causing a substantive evil which the government has a right to avoid. *Id.* No such justification exists in this case.

By definition, non-governmental acts cannot constitute an "establishment of religion" without some showing of active government involvement. *See Part I, supra.* Nevertheless, the Court of Appeals incorrectly relied upon establishment of religion as the "evil" which mandates disparate treatment and prior restraint of student religious speech. (App. at A-14).

This Court of Appeals decision is in direct contravention of *Roemer v. Board of Public Works, 426 U.S. 736,746 (1976)* and other decisions which hold that religious groups have a right of equal access to public forums for meetings, prayer, and religious discussion. The Court of

Appeals has mandated the quarantine of religious speech and ideas from a forum which is freely available to students for other types of speech before, during and after the school day and to non-students during non-school hours. *Niemotko* v. *Maryland, 340 U.S. 268 (1951)* (Jehovah's Witnesses have a right to use park for Bible talks); *Kunz* v. *New York, 334 U.S. 558 (1948)* (religious groups have right to equal access to parks and streets for their religious activities). *Poulos* v. *New Hampshire, 345 U.S. 395 (1953); Tucker* v. *Texas, 326 U.S. 517 (1946); Fowler* v. *Rhode Island, 345 U.S. 67 (1953); Chess* v. *Widmar, --F.2d--(8th Cir. 1980), petition for cert. filed 49 U.S.L.W. 3353 (Nov. 11, 1980) (No. 80-689); Keegan* v. *University of Delaware, 349 A.2d 14 (Del. 1975), cert. denied 24 U.S. 934 (1976)* (worship in

dormitory "commons room" at state university).

As recently as 1972, this Court affirmed *Niemotko* and *Fowler* in *Police Department of Chicago* v. *Mosley*, *408 U.S. 92 (1972)*, twice emphasizing that the earlier cases involved religious activities on public property. 408 U.S. at 96-97 (1972).

In *Mosley*, this Court affirmed the freedom of speech and equal protection principles of its earlier public cases by striking down a city ordinance which allowed only labor groups to picket within 150 feet of public school buildings. In language which is applicable to the instant case, it was held that the ordinance unconstitutionally discriminated against non-labor picketing on the basis of subject matter:

> ...Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities... *Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.* 408 U.S. at 96. (Emphasis added). *Accord, Carey v. Brown, 48 U.S.L.W. 4756 (U.S. June 20, 1980)*

Since allowing speakers to use public school property during non-school hours makes it a public forum during those periods to various speakers makes it a public forum under the First Amendment it is difficult to understand the court below's finding that a public high school during non-school hours is not a public forum. (App. at p. A-17,18). In this case, the high school is open for use by a multi-

tude of student and citizen groups. (R. Joint Ap. at pp. 15-18). The Court of Appeals' focus on the operation of busses, the presence of school personnel, and provision of utilities does not change the nature of the forum -it is a public forum as long as instruction is not being given. *See, Reed v. Van Hoven, 237 F.Supp. 48, 54-56 (W.D. Mich. 1965); Johnson v. Huntington Beach Union High School District, 137 Cal. Reptr. 43, 53 (1977)* (interpreting the State Civic Center Act); *Bonner-Lyons v. School Committee of Boston, 480 F.2d 442, 444 (1st Cir.1973)* (public school information network of "public forum" once opened to expression of views of one group). In this respect, a high school, during non-school hours, is identical to a college or university.

Moreover, other courts which have considered the issue agree that a high school is a forum for student free speech. *Tinker* v. *Des Moines Independent School District*, *393 U.S. 503, 511, 513 (1969)*.

Finally, contrary to the holding below (App. at A-12, 19) this Court has never held that the availability of an alternate forum for a religious speaker is grounds for denying the speaker access to a public forum open to other groups. *See, e.g., Cantwell* v. *Connecticut, 310 U.S. 296 (1940); Healy, supra; Murdock* v. *Pennsylvania, 319 U.S. 105 (1943); Kunz* v. *New York, supra; Saia* v. *New York, supra,* and *Tinker* v. *Des Moines, supra.* Thus, the fact that petitioners might be able to gather elsewhere for their meeting is constitutionally

irrelevant.[5]

However, petitioners have never argued that respondents are prevented from regulating time, manner and place of student student free speech in the school building. In *Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)*, a Court upheld the wearing of armbands by public school students *during school hours* in protest of the Vietnam War. Although students have a right to express their views "in the absence of a specific showing of constitutionally valid reasons to regulate their speech...," 393 U.S. at 505-06.

The court directly addressed the time, manner and place restrictions which

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[5] The students were, in any event, attending high school pursuant to the mandatory attendance laws of the State of New York. (R. Joint App. at p. 6)

The court directly addressed the time, manner and place restrictions which would be valid:

> conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. 393 U.S. at 513.

In short, "freedom of speech may be exercised to its fullest potential on school premises as long as it does not unreasonably interfere with normal school activities." *Sullivan v. Houston Independent School District, 307 F.Supp. 1328, 1340 (S.D. Texas 1969). Accord, Lawrence University Bicentennial Comm'n. v. City of Appleton, 409 F.Supp. 1319 (E.D. Wis. 1976)*[6]

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6 Federal courts have consistently invalidated total bans of religious
(continued on following page)

B. Associational Rights

Since the landmark decision of *Healy* v. *James*, *408 U.S. 169 (1972)*, this Court has also recognized that the right

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speech on public school property. *See, e.g.,Chess* v. *Widmar, supra; Stacy* v. *Williams, 306 F.Supp. 963, 975 n. 28 (N.D. Miss. 1969) (three judge court); Cintron* v. *Board of Education, 384 F.Supp. 674, 679 (D.P.R. 1974); Lawrence University Bicentennial Commission* v. *City of Appleton, 409 F.Supp. 319, 322-24 (E.D. Wis. 1976)*

Similarly, the Courts have invalidated regulations which punish or ban other forms of speech based on their content, and not their potential for causing a "clear and present danger." *Scoville* v. *Board of Education, 425 F.2d 10 (7th Cir. 1970) (en banc); Wilson* v. *Chancellor, 418 F.Supp. 1358 (D. Ore. 1976)* (ban on all political speakers on campus unconstitutional); *Smith* v. *University of Tennessee, 300 F.Supp. 777, 783 (E.D. Tenn. 1969)* (ban on controversial speakers unconstitutional). *Accord Brooks* v. *Auburn University, 296 F.Supp. 188 (M.D. Ala. 1969); Snyder* v. *Board of Trustees of University of Illinois, 286 F.Supp. 927, 933 (N.D. Ill. 1969).*

of "freedom of association" is inherent in a student's First Amendment freedoms. 408 U.S. at 181. In *Healy*, this Court reviewed a public college's refusal to grant recognition to a local chapter of Students for a Democratic Society (SDS) which was endeavoring to become an official student organization.

School officials argued there was no constitutional action by the school because the students could meet as a group and distribute material off campus. 408 U.S. at 182-18. But the court found otherwise:

> Denial of official recognition posed serious problems for the organization's existence and growth. Its members were deprived of the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper; they were precluded from using various campus bulletin boards; and - most importantly - non-recognition barred them from using campus facilities for holding meetings. 408 U.S. at 176.

Notably, even these indirect effects on First Amendment association rights were sufficient to call into play the First Amendment.

> Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Id.* at 183.

In this respect *Healy* is entirely consistent with the pubic forum cases, discussed in detail previously, which unequivocably hold that forums open to certain groups must be made available to all -- including religious groups. But since the Petitioners here in did not even seek official recognition of their activities, there can be no question that the *entire* focus of the Court of Appeals was the content of the intended speech and the reasons for the intended association. It thereby carved out a major

exception to the settled rules established by *Tinker* and *Healy* and placed itself squarely in conflict with two other circuits on the question of the speech and associational rights of high school students. *See, Scoville* v. *Board of Education, 425 F.2d 10, 13, N.5 (7th Cir. 1975) (en banc); Garvin* v. *Roenaw, 455 F.2d 233 (6th Cir. 1972); Dixon* v. *Beresh, 361 F.Supp. 253, 254 (E.D. Mich. 1973). Compare, Chess* v. *Widmar, supra,* (arguing that while college students may associate and speak freely respecting religious themes, high school students may not).

C. Free Exercise

It is beyond cavil that the petitioners' requests to be allowed to use a classroom during non-school hours each day for religious speech were based on sincerely held religious belief protected by the free exercise clause of the First Amendment.[7] The students alleged that they believe they owed their entire existence to God and were required to join together as a group to acknowledge their belief in God. (App. pp. 10-11) It is undisputed that they are required to attend school by the New York statutes

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[7] *See United States v. Ballard, 322 U.S. 78 (1944); United States v. Seeger, 380 U.S. 163 (1965); and Fowler v. Rhode Island, 345 U.S. 67 (1953)* where this Court held that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the first amendment." 345 U.S. at 69.

mandating compulsory education, N.Y. Educ. Law §§3201-3234, and that they believe communal prayer, prior to starting the school day or at its close, is one of the most important ways to exercise their beliefs. No one has questioned their sincerity. Their requests were not denied because the Students for Voluntary Prayer appeared insincere, but because the school officials, acknowledging the religious character of the students meeting proposal, felt that approval would constitute advancement of religion contrary to the Establishment Clause. (R. Joint App. at p. 27).

In order to proscribe the students' free exercise rights the school board was compelled to demonstrate that they had a compelling state interest in such action and no less restrictive means of achiev-

ing that goal. *Sherbert v. Verner, 347 U.S. 398 407 (1963). Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).* However, the Courts below lifted this burden by holding that the Establishment Clause provided the compelling interest. Since it has been demonstrated that private religiousspeech, regardless of its location, cannot constitute an establishment of religion, the need for the state to avoid aid to religion cannot serve as compelling support for the prior restraints imposed below. *McDaniel v. Paty, supra.* Notwithstanding the opinion of the court below, neither the availability of alternative forums nor the lack of identity between the proposed prayer meeting and institutional ritual negates the requirement that the School Board must accommodate the proposed practice. *Cantwell v. Connecticut, supra. But see*

Appendix at A-11. The School Board must accommodate religious practices where there is no compelling interest in excluding them. Since no other compelling reason has been offered by either the Board of Education of the Court of Appeals, the writ should be granted and the decision below reversed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: February 16, 1981

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 291—September Term, 1980

(Argued October 28, 1980 Decided November 17, 1980)

Docket No. 80-7382

JEANNE BRANDON, *et al.*,

Appellants,

—against—

THE BOARD OF EDUCATION OF THE GUILDERLAND CENTRAL SCHOOL DISTRICT, *et al.*,

Appellees.

Before:

KAUFMAN, KEARSE and BRIGHT,*

Circuit Judges.

Appeal from a judgment of the United States District Court for the Northern District of New York, Neal G.

* Of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

McCurn, *Judge*, granting summary judgment in favor of defendants, and dismissing complaint by high school students claiming that refusal of defendants to grant them the use of a classroom for voluntary communal prayer meetings immediately prior to commencement of the school day violated their First Amendment rights to the free exercise of religion.

Affirmed.

ROBERT M. ANDERSON, ESQ., Chicago, Illinois (Robert P. Roche, Albany, New York, David M. Fleming, Catholic League for Religious and Civil Rights, Milwaukee, Wisconsin, of counsel), *for Appellant*.

C. THEODORE CARLSON, ESQ., Albany, New York (Tabner, Carlson, Daffner and Farrell, Albany, New York), *for Appellees*.

LEO PFEFFER, ESQ., New York, as *Amicus Curiae* for the American Jewish Congress, American Jewish Committee, Anti-Defamation League of B'nai B'rith, Central Conference of American Rabbis, Jewish Labor Committee, Jewish War Veterans of the U.S.A., Rabbinical Assembly, Rabbinical Council of America, Union of American Hebrew Relations Advisory Council in behalf of the one hundred and eight Jewish Community Councils throughout the United States.

KAUFMAN, *Circuit Judge*:

To many Americans, the state's noblest function is the education of our nation's youth. We entrust this responsibility largely to the public schools, and hope our children grow into responsible citizens by learning the enduring values of Western Civilization we all share—an appreciation of critical reasoning, a commitment to democratic institutions, and a dedication to principles of fairness. In this immigrant nation of dreamers and dissidents, however, no broad consensus regarding the spiritual side of the human condition exists. Our Founding Fathers recognized the disharmony and drafted the Bill of Rights to require the separation of church and state. Accordingly, religious activity under the aegis of the government is strongly discouraged, and in some circumstances—for example, the classroom—is barred. The sacred practices of religious instruction and prayer, the Framers foresaw, are best left to private institutions—the family and houses of worship. In short, logic, tradition, and law create in our nation a "wall between church and state," *Everson v. Board of Education,* 330 U.S. 1, 18 (1947). In this case, brought by students seeking to force a public school to allow joint prayer sessions in the school before classes begin, we are asked to dismantle that wall. Because the First Amendment does not require—or even allow—such permission, we affirm the dismissal below of the students' complaint.

I.

Questions of religious freedom can depend on sensitive issues of fact, and we turn first to the particular circumstances in which this case arose. In 1978, several students at Guilderland High School organized a group called

"Students for Voluntary Prayer." They sought permission in September 1978 from the school's principal, Charles Ciaccio, to conduct communal prayer meetings in a classroom immediately before the school day commenced. The group noted that it was not seeking supervision or faculty involvement, and stated that its activities were voluntary and would not conflict with other school functions.

The principal denied the request by letter dated September 23, 1978. Shortly thereafter, the Superintendent of the Guilderland School District refused permission. The Guilderland Board of Education voted on December 19, 1978, and again on March 6, 1979, to deny the group's request. Six students[1] filed suit in June 1979 individually and on behalf of those students similarly situated. They stated in the complaint that the defendants—the Board of Education and its individual members, the Superintendent of the school district, and Ciaccio, the principal—violated their First and Fourteenth Amendment rights to the free exercise of religion, freedom of speech, freedom of association, and equal protection. The students sought declaratory relief and requested the court to enjoin the defendants from denying them a classroom for their prayer meetings. The complaint prayed for monetary damages as well.

On April 16, 1980, Judge McCurn granted summary judgment for the defendants, holding that the students

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[1] Three of the six plaintiffs—Jeanne Brandon, Jill George, and William Smith—were minors when the action was commenced and were represented by their parents or legal guardians. All of the plaintiffs have since graduated from Guilderland High School. No mootness problem exists, however, *DeFunis v. Odegaard*, 416 U.S. 312 (1974), because the students were acting in a representational capacity for members of the "Students for Voluntary Prayer." *See Trachtman v. Anker*, 563 F.2d 512, 514 n.1 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978). Moreover, their claim for monetary damages remains extant.

were not entitled to relief as a matter of law and dismissing the complaint. After addressing several procedural points,[2] the court found that the Establishment Clause of the First Amendment barred the school from permitting the students to conduct prayer meetings in a classroom. Applying the tripartite test for Establishment Clause analysis formulated by the Supreme Court, *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), Judge McCurn found that while a school's decision involving the use of school premises might have a secular pupose, the granting of the group's request would have had the impermissible effect of advancing religion. In addition, if the prayer meetings were conducted, an excessive entanglement between a supposedly secular school and clearly religious activities would result because faculty surveillance would be needed to assure that the meetings were voluntary.

Further, Judge McCurn found the school's refusal did not violate the students' rights freely to exercise their religious beliefs. Moreover, even if some infringement occurred, the compelling state interest in maintaining the separation between church and state justified that restriction. Judge McCurn also rejected the students' freedom of speech and association arguments. Finally, the court

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2 Judge McCurn correctly held that the plaintiffs' failure to present a written verified complaint to the school officials within three months after the accrual of their claim, required by New York Educ. Law § 3813(1)(McKinney) as a condition precedent to the commencement of non-tort suits against a school district, did not necessitate dismissal of the complaint. He found that compliance with the notice requirement is not mandatory in civil rights actions brought pursuant to 42 U.S.C. § 1983. *See Paschall v. Mayone*, 454 F. Supp. 1289, 1298 (S.D.N.Y. 1978); *Glover v. City of New York*, 401 F. Supp. 632, 635 (E.D.N.Y. 1975); *Carrasco v. Klein*, 381 F. Supp. 782, 787 n.12 (E.D.N.Y. 1974); *Laverne v. Corning*, 316 F. Supp. 629, 637 (S.D.N.Y. 1970).

found that the Equal Protection Clause of the Fourteenth Amendment did not require a religious organization to be treated in a manner similar to the secular student groups permitted to use the school's facilities. The students appeal the dismissal of their complaint.

II.

The First Amendment's language protecting religious freedom is both crisp and elegant: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." While the ambiguities of history prevent us from determining exactly how the Founding Fathers intended the Establishment and Free Exercise Clauses to interact, coherent themes exist. The Supreme Court's identification and elaboration of doctrine provides guidance to legislators, courts, and even school boards, in an era when the government's regulation of daily life is pervasive and when our nation's religious composition is far more diverse than that of post-Revolutionary America.

First Amendment jurisprudence emerges from a colonial background that reflected varying justifications for the separation of church and state.[3] An evangelical view, associated with Roger Williams, feared the corruptive influence of secular statism on religious purity. Religious freedom and separatism, therefore, were necessary for the protection of the spiritual life. A more worldly school of thought, associated with Jefferson, sought to protect the state from the church, and found that the erection of a "wall of separation," *Everson, supra,* was necessary. The third view, that of James Madison, was that both religion

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[3] See L. Tribe, *American Constitutional Law* § 14-3 at 816-17 (1978).

and the state would prosper if freed from the undesirable effects each presented to the other.

The Supreme Court has consolidated these historical antecedents[4] to articulate three major policies underlying religious freedom: voluntarism of religious thought and conduct, government neutrality towards religion, and the separation of church and state.[5] Voluntarism recognizes that private choice, not official coercion, should form the basis for religious conduct and belief. *Walz v. Tax Commission*, 397 U.S. 664, 694 (1970)(Harlan, J., concurring). Governmental neutrality reinforces voluntarism, for it assures its citizens, on the one hand, that no official imprimatur lies behind any set of religious beliefs or practices and, on the other, that no particular dogma is officially condemned. *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963); *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Separation is meant to foster voluntarism and neutrality, and also to preserve the integrity of both religion and government. *See Engel v. Vitale, supra*, 370 U.S. at 431.

As the role of government became more pervasive, a tension between principles of voluntarism and separation inevitably emerged. A strict reading of the Establishment Clause's erection of the wall between church and state would require government to refrain from providing even the most essential public services to religious organizations. Such inflexible separation, however, threatens free

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4 *See, e.g., Walz v. Tax Commission*, 397 U.S. 664, 667-72 (1970); *School District of Abington Township v. Schempp*, 374 U.S. 203, 230-42 (1963) (Brennan, J., concurring); *Everson v. Board of Education*, 330 U.S. 1 (1947).

5 Tribe, *supra*, § 14-4 at 818-19; Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 Harv. L. Rev. 696, 697-700 (1979).

exercise, and therefore the principle of neutrality requires the state to provide fire and police services—and even some forms of financial assistance—to religious schools and organizations. *Roemer v. Board of Public Works*, 426 U.S. 736, 746-47 (1976).[6] Accommodation of these three constitutional values is a trying task, but one in which courts are compelled to engage.

III.

When we apply these doctrines—voluntarism, neutrality, and separation—to the facts of this case, we discover that many of the Supreme Court's religion decisions arose in a somewhat different context. Most controversies involving prayer in the schools or the granting of financial assistance to religious schools involved an Establishment Clause challenge to state statutes or regulations' *supporting* religious activity—the recitation of classroom prayers, *School District of Abington Township v. Schempp*, *supra*, the use of school facilities for religious instruction, *McCollum v. Board of Education*, 333 U.S. 203 (1948), and the reimbursement for costs incurred in teaching-related activities, *e.g.*, *Regan*, *supra*; *Lemon v. Kurtz-*

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6 *See, e.g., Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980)(reimbursement to religious schools for costs in administering statewide standardized tests); *Board of Education v. Allen*, 392 U.S. 236 (1968)(textbook loan program to students of private schools); *Everson v. Board of Education*, *supra* (reimbursement to parents of parochial school students for public transportation costs).

7 The religious freedoms protected by the First Amendment are incorporated in the Fourteenth Amendment, and therefore limit the conduct of state governments as well as the federal government. *Regan*, *supra*, 444 U.S. at 649 n.1 (1980); *Everson*, *supra*, 330 U.S. at 15 (incorporating Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940)(incorporating Free Exercise Clause).

man, supra. These cases present the question whether the particular state action encouraging religious activity demonstrates an impermissible support of religion and an infringement of the free exercise rights of others who fail to receive similar state support.

This case raises a different problem. The local school board, acting as a duly authorized agent of New York state, New York Educ. Law § 414 (McKinney); *Trietley v. Board of Education,* 65 A.D.2d 1, 5, 409 N.Y.S.2d 912, 915 (1978), *refused* to sponsor religious activity in public schools. The suit was brought by advocates of religious activity, who seek to compel the granting of permission. Our focus, therefore, is to determine whether the school's refusal violated the Free Exercise rights of the "Students for Voluntary Prayer," and exhibited a degree of hostility towards a particular religious organization sufficient to transgress the principle of government neutrality, thereby violating the Free Exercise Clause. Once we examine the implications of the School Board's refusal, we will turn to the Establishment Clause problems that would have arisen had the School Board authorized the holding of voluntary prayer meetings prior to the commencement of the school day.

A.

To demonstrate an infringement of his free exercise rights, an individual must show "the coercive effect of the [state] enactment as it operates against him in the practice of his religion." *School District of Abington Township v. Schempp, supra,* 374 U.S. at 223. The analysis need not involve a court in determining the sincerity of one's religious beliefs, *United States v. Ballard,* 322 U.S. 78 (1944), but it does require that the court inquire into the relative importance of a particular religious ritual and the

degree to which exercise of that practice is infringed by government action. *See, e.g., Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Sherbert v. Verner,* 374 U.S. 398 (1973). *See also* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part 1. The Religious Liberty Gurantee,* 80 Harv. L. Rev. 1381, 1390-1423 (1967). A limitation on religious exercise is justified only if the state can demonstrate that its compelling interest in public health, welfare, morality, or other secular values justifies the restriction, and that less restrictive means to achieve the state's secular ends are not available. *See Sherbert v. Verner, supra,* 374 U.S. at 406; *see also* L. Tribe, *American Constitutional Law* § 14-10 (1978). Reconciliation of these conflicting individual and state interests is accomplished only through an arduous balancing effort, one in which courts reluctantly engage.

In *Wisconsin v. Yoder, supra,* the Supreme Court found the criminal sanctions contained in a state compulsory education statute requiring attendance through age sixteen to violate the free exercise rights of Amish parents and their children. The Amish faith, the Court found, requires its members to lead a simple life, and to minimize contact with world influences by discontinuing formal schooling after the eighth grade. Chief Justice Burger, writing for the Court, found the practice "fundamental" and "mandated by the Amish religion." 406 U.S. at 216, 217. The state's interest in the education of its citizens, admittedly significant, was therefore not sufficiently compelling to force the Amish to send their children to school beyond the eighth grade.

Similarly, in *Sherbert v. Verner, supra,* the Court found the observance of the Sabbath to be a "cardinal principle" for Seventh Day Adventists, 374 U.S. at 406. While the state's goal of preventing the raising of spurious

unemployment claims and the subsequent dilution of state assistance funds was important, it did not justify forcing a Seventh Day Adventist to choose between following fundamental religious beliefs and eschewing benefits to which she was otherwise entitled. The state's failure to show that less restrictive practices would not have furthered its interest in preventing fraudulent claims supported the finding of a free exercise violation.[8]

B.

We find that the free exercise rights of the "Students for Voluntary Prayer" were not limited by the Guilderland School District's refusal to permit communal prayer meetings to occur on school premises. The students assert in their complaint that "God has directed them to join together with one another and pray to him as a group whenever possible and that such communal

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[8] In several additional landmark free exercise cases the individual religious interests of Jehovah's Witnesses in peddling their religious literature, *e.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and of members of the American Native Church in using peyote for religious ceremonies, *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 40 Cal.Rptr. 69 (1964), outweighed state interests advanced for the regulation of those activities through licensing and the imposition of criminal sanctions, respectively. But the public interest in the health and well-being of minors justified a statutory ban on the public sale of religious periodicals by minor members of the Jehovah's Witnesses, *Prince v. Massachusetts*, 321 U.S. 158 (1944). The desirability of creating a uniform day of rest was accepted by the Supreme Court in *Braunfeld v. Brown*, 366 U.S. 599 (1961), which held that an Orthodox Jewish merchant had no right to an exemption to Pennsylvania's Sunday closing law. For a discussion of how *Braunfeld* has survived the Supreme Court's decision in *Sherbert v. Verner*, 374 U.S. 398 (1963), see Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1400-03 (1967). Finally, the state's interest in maintaining public morality, difficult at best to define clearly, served as the basis for refusing to grant the Mormons an exemption from federal laws prohibiting bigamy. *Reynolds v. United States*, 98 U.S. 145 (1878).

prayer is particularly rewarding and effective. . . ." We do not challenge the students' claim that group prayer is essential to their religious beliefs. The effect of the school's actions, however—denying the students the opportunity to pray together in a classroom at the commencement of a school day—is hardly analogous to the coercive restraints on religious observation imposed by state action in *Sherbert* or *Yoder.*

The dilemma presented to individuals in *Sherbert* and *Yoder* was absolute. Individuals were forced to choose between neglecting their religious obligations and rendering themselves liable for criminal sanctions or ineligible for state benefits. The choice for the students in this case is much less difficult because the school's rule does not place an absolute ban on communal prayer, nor are sanctions faced or benefits forfeited. While school attendance is compelled for several hours per day, five days per week, the students, presumably living at home, are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place. *Stein v. Oshinsky,* 348 F.2d 999, 1001 (2d Cir.), *cert. denied,* 382 U.S. 957 (1965), *citing School District of Abington Township v. Schempp, supra,* 374 U.S. at 299 (Brennan, J., concurring). Several courts have noted that denial of the use of school facilities to students who wish to conduct voluntary prayer meetings during the school day does not violate the Free Exercise Clause. *Hunt v. Board of Education,* 321 F. Supp. 1263 (S.D. W.Va. 1971); *Trietley v. Board of Education, supra; Johnson v. Huntington Beach Union High School District,* 68 Cal.App.3d 1, 137 Cal.Rptr. 43 (Ct. App.), *cert. denied,* 434 U.S. 877 (1977). *Contra, Reed v. Van Hoven,* 237 F. Supp. 48 (W.D. Mich. 1965). We do not have before us the case of a Moslem who must prostrate

himself five times daily in the direction of Mecca, or children whose beliefs require prayer before lunch, sports or other school activities. *Stein v. Oshinsky, supra,* 348 F.2d at 1001-02. If faced with these religious demands from students, a school board might have to make additional accommodations to permit the students to withdraw momentarily from the class. *See Zorach v. Clauson,* 343 U.S. 306, 313-14 (1952). We have not been convinced, however, that the religious needs of the "Students for Voluntary Prayer" require such accommodation.

Several cases have noted that the free exercise rationale set forth above does require the state to permit prayer in certain special circumstances. But, none of them is applicable here. Authorization for prayer at public universities, for example, has been required because students both study and reside there. Frequently they are unable to hold prayer meetings off campus. *Chess v. Widmar,* No. 80-1048 (8th Cir. Sept. 19, 1980), *petition for cert. filed,* No. 80-689, 49 U.S.L.W. 3353 (Nov. 11, 1980); *Keegan v. University of Delaware,* 349 A.2d 14 (Del. 1975), *cert. denied,* 424 U.S. 934 (1976). Similarly, because the isolated member of the armed forces or the prison inmate may have no access to the regular religious facilities of the community, free exercise freedoms would be jeopardized if religious activity on a military base or in a prison were not authorized. *School District of Abington Township v. Schempp, supra,* 374 U.S. at 296-99 (Brennan, J., concurring). Here, however, the students have made no showing that they lack other facilities for communal prayer.

C.

Even if we were to accept the students' contention that the School Board's refusal to allow school prayer signifi-

cantly encumbered their free exercise rights, a "compelling state interest" against the prayer meetings was present. *Sherbert v. Verner, supra.* The School Board asserted as an affirmative defense below, and argues as a compelling state interest here, that an authorization of student-initiated voluntary prayer would have violated the Establishment Clause by creating an unconstitutional link between church and state. We agree.

A state statute or regulation does not contravene the Establishment Clause if (1) the enactment has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement with religion. *Regan, supra,* 444 U.S. at 653; *Lemon v. Kurtzman, supra,* 403 U.S. at 612-13.

A neutral policy granting all student groups, including religious organizations, access to school facilities reflects a secular, and clearly permissible purpose—the encouragement of extracurricular activities. *Chess v. Widmar, supra,* slip op. at 15; *Johnson v. Huntington Beach Union High School District, supra.* The second, or "effects," test is more difficult to apply, for its standards are uncertain; determination of the "principal" or "primary" effects of a state action, *Regan, supra,* or even the supposedly more refined "direct and immediate effect" standard, *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 783 n.39 (1973), is, as one commentator notes, a "metaphysical distinction." Tribe, *supra,* § 14-9 at 840. The underlying question, however, is relatively straightforward: does a particular policy which is neutrally applied to religious organizations merely accommodate religious interests, or does it advance those nonsecular interests impermissibly?

Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit. *See Roemer v. Board of Public Works, supra,* 426 U.S. at 750, 764 (1976); *Abington, supra; Engel, supra; Chess v. Widmar, supra,* slip op. at 22-23; Tribe, *supra* § 14-5 at 825. An adolescent may perceive "voluntary" school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the "captive audience" setting of a school. *O'Hair v. Andrus,* 613 F.2d 931, 936 (D.C. Cir. 1979) (Leventhal, J.). Misconceptions over the appropriate roles of church and state learned during one's school years may never be corrected. As Alexander Pope noted, "Tis Education forms the common mind, / Just as the twig is bent, the tree's inclin'd." (Epistle to Lord Cobham).

Abington and *Engel,* for example, involved teacher supervision of the reading of verses from the Bible and the recital of a prayer composed by the State Board of Regents. Although students were permitted to be excused from the classroom during the prayer, the Supreme Court found that a particular form of Western theistic religion was improperly advanced by it. Similarly, when teachers from religious organizations are permitted to enter a public school for the purpose of religious instruction, the symbolism is apparent. *McCollum, supra.* Religious interests are permissibly accommodated, and not advanced, however, where a public school allows its students to leave

the premises for religious instruction under a "released time" program. *Zorach, supra.* Further, the semblance of official support is less evident where a school building is used at night as a temporary facility by religious organizations, under a program that grants access to all charitable groups. *Resnick v. East Brunswick Township Board of Education,* 77 N.J. 88, 389 A.2d 944 (1978). Also, where a clergyman briefly appears at a yearly high school graduation ceremony, no image of official state approval is created. *Wood v. Mt. Lebanon Township School District,* 342 F. Supp. 1293 (W.D. Pa. 1972).

The degree of official support of religious activities is greater, of course, in the school prayer or religious instruction cases than in the instant case. The record indicates that school buses discharge students at the Guilderland High School between 7:20 a.m. and 7:40 a.m., and that the official school day "begins" at this point. Any voluntary student prayer meetings conducted after the arrival of the school buses and before the formal "homeroom" period at 7:50 a.m., therefore, would occur during school hours. The prayer meetings would create an improper appearance of official support, and the prohibition against impermissibly advancing religion would be violated.

The final element of the test is the prohibition of "entanglement," and the School Board has demonstrated that an excessive involvement of the state in religious matters would have resulted if the students' requests were granted. Entanglement analysis focuses on procedural questions, *Roemer v. Board of Public Works, supra,* 426 U.S. at 755, and, if the state must engage in continuing administrative supervision of nonsecular activity, church and state are excessively intertwined. This frequently occurs where categorical grants to private schools are

distributed, since constant surveillance by the state is necessary to guarantee that no funds are used for religious purposes. *See, e.g., Nyquist, supra; Lemon, supra.* Excessive entanglement is undesirable because it involves state scrutiny of religious activities, a task necessarily requiring oversight of "core matters of belief and ritual." Tribe, *supra* § 14-12 at 870. This involvement threatens the voluntarism of religious observance and violates the principle of separation.

School officials in this case would be forced to monitor the activities of the "Students for Voluntary Prayer." The School Board has a duty under New York law to provide adequate supervision of all students in its "care and charge" during school hours. *Lauricella v. Board of Education*, 52 A.D.2d 710, 711, 381 N.Y.S.2d 566, 568 (4th Dep't 1976). Since the voluntary prayer meetings, to be conducted after the arrival of school buses, would, as we have said, occur during school hours, official supervision is required by law to ensure the smooth functioning of the school's secular schedule and the maintenance of the school's safety and order. More importantly, surveillance will be required to guarantee that participation in the prayer meetings would always remain voluntary.[9]

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9 In *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965), the court authorized a school to permit student-initiated voluntary prayer at the commencement of the school day. Teacher supervision was permitted to maintain order at the prayer sessions. The court suggested that no bell signifying the start of the prayer exercise would be rung and that there should be a general commingling of the entire student body on the way to class.

While the outcome of the case was questionable even in 1965, the Supreme Court's adoption of the entanglement test in 1969, *Walz v. Tax Commission, supra*, 397 U.S. at 674, seriously undercuts the holding. The faculty supervision authorized by the court's decision is indicative of continuing surveillance of the students' prayer sessions that would have been necessary to assure that no coercion resulted.

Finally, we note that the state's compelling Establishment Clause interest in removing from the school any indication of sponsoring religious activity leads to the inescapable conclusion that no alternative accommodations were possible. *See, e.g., Engel v. Vitale, supra.*

IV.

This leaves for our disposition the students' claim that the School Board's refusal violates their rights to free speech, freedom of association, and equal protection. The students' argument, in short, is that they merely seek to exercise their rights to free speech in a public forum, unencumbered by governmental regulation of the context of their "speech." They state that, in general, students retain their fundamental constitutional right to free speech while attending school, *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506 (1969), and that restraints on religious speech in a public forum are impermissible. *Fowler v. Rhode Island,* 345 U.S. 67 (1953). Moreover, they argue that the School Board's denial of their request, in light of the ability of other student organizations to use school facilities, infringes their Fourteenth Amendment right to equal protection.

Two significant factors, however, defeat the claims. First, a high school is not a "public forum" where religious views can be freely aired. The expression of religious points of view, and even the performance of religious rituals, is permissible in parks and streets when subject to reasonable time, place, and manner regulations. *Niemotko v. Maryland,* 340 U.S. 268 (1951); *Kunz v. New York,* 340 U.S. 290 (1951); *O'Hair v. Andrus, supra.* The facilities of a university have also been identi-

fied as a "public forum," where religious speech and association cannot be prohibited. *Chess v. Widmar, supra,* slip op. at 18-20; *Keegan v. University of Delaware, supra.* A high school classroom, however, is different, *Chess v. Widmar, supra,* slip op. at 22-23. While students have First Amendment rights to political speech in public schools, *Tinker, supra,* sensitive Establishment Clause considerations limit their right to air religious doctrines. Equally compelling, the students in this case propose to conduct *prayer* meetings in the high school, not merely discussions about religious matters. When the explicit Establishment Clause proscription against prayer in the public schools is considered, *School District of Abington Township v. Schempp, supra; Engel, supra,* the protections of political and religious speech, *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972); *Saia v. New York,* 334 U.S. 558 (1948), are inapposite. *See Chess v. Widmar, supra* (Bright and McMillian, JJ., dissenting from denial of rehearing en banc). In short, these two vital distinctions indicate that the students' free speech and associational rights, cognizable in a "public forum," are severely circumscribed by the Establishment Clause in the public school setting. Because of the symbolic effect that prayer in the schools would produce, we find that Establishment Clause considerations must prevail in this context.

Also, the students' equal protection argument is not persuasive. Other organizations are permitted to utilize school facilities, but their use does not raise serious problems of the establishment of religion. Moreover, since all religious groups are equally denied access to school facilities, any equal protection argument lacks merit. *See Trietley, supra,* 409 N.Y.S.2d at 917.

V.

Although we affirm the dismissal of the students' complaint, we cannot be critical of their objectives. Introspective activity that seeks to strengthen the moral fibre of our nation's young adults deserves our support, but only in our role as private citizens. We hope that the "Students for Voluntary Prayer" can conduct their prayer meetings and religious discussions at another place and at different times. To permit these activities to occur in the classrooms of a public high school immediately prior to the commencement of the school day, however, would contribute to the erosion of principles articulated by our colonial fathers and embraced by religious dissenters for several hundred years. To paraphrase Lord Melbourne, while the state cannot be regarded as a pillar of the edifice of religion, it may be considered a buttress, supporting free exercise from the outside. We must be careful that our public schools, where fundamental values are imparted to our children, are not perceived as institutions that encourage the adoption of any sect or religious ideology.

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